

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP68

Cir. Ct. No. 2003CF127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD MAX LEWIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Forest County:
JAMES R. HABECK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Edward Max Lewis appeals an order denying his WIS. STAT. § 974.06¹ postconviction motion without an evidentiary hearing. Because we conclude the motion was procedurally barred, we affirm the order.

¶2 In 2004, a jury convicted Lewis of repeated sexual assault of a child. Represented by counsel, Lewis appealed the conviction, arguing that the circuit court improperly admitted other-acts evidence and that the State failed to prove three or more sexual assaults occurred. This court affirmed the conviction, *State v. Lewis*, No. 2005AP1186-CR, unpublished slip op. (WI App Dec. 13, 2005), review denied, 2006 WI 39, 290 Wis. 2d 23, 712 N.W.2d 897 (Mar. 15, 2006).

¶3 In 2008, Lewis filed a pro se postconviction motion under WIS. STAT. § 974.06 raising twenty-one issues. He then filed a supplemental motion raising eleven additional issues. The circuit court denied the motion, as supplemented, and Lewis appealed. This court noted Lewis raised numerous issues on appeal that either were wholly undeveloped or based on factual claims that were refuted by the record. We confined our review to three issues: (1) whether WIS. STAT. § 974.06(3) required the circuit court to hold an evidentiary hearing when it allowed, but did not compel, the State to file a response; (2) whether Lewis's trial counsel was ineffective for failing to remove four jurors from the panel, failing to introduce written reports prepared by the State's witnesses, and failing to challenge the credibility of Lewis's brother, Orin; and (3) whether Orin's recantation provided a basis for a new trial. We rejected Lewis's arguments and affirmed the order. *State v. Lewis*, No. 2008AP2429,

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

unpublished slip op. (WI App July 28, 2009), *review denied*, 2010 WI 5, 322 Wis. 2d 126, 779 N.W.2d 178 (Nov. 12, 2009).

¶4 After Lewis filed a petition for a writ of habeas corpus in federal court, which petition was put on hold pending exhaustion of State remedies, Lewis filed a habeas corpus petition in this court. We dismissed the petition because Lewis's claim could have been raised in his prior postconviction proceedings and he failed to establish a valid reason for not doing so, and because he asserted claims that were previously litigated. We further held that, to the extent Lewis alleged ineffective assistance of appellate or postconviction counsel, his allegations were again wholly conclusory and undeveloped. The Wisconsin Supreme Court denied Lewis's petition for review. *State ex rel. Lewis v. Hepp*, No. 2011AP1228-W, unpublished slip op. and order (WI App Sept. 20, 2011), *review denied*, 2012 WI 34, 339 Wis. 2d 738, 810 N.W.2d 224 (Feb. 23, 2012).

¶5 Lewis then filed the present motion under WIS. STAT. § 974.06 raising four issues: (1) he again argues two of the jurors should have been removed for cause; (2) he was denied a fair trial because the jury was not informed that Orin had reached a plea agreement with the State; (3) Lewis's competency to stand trial was not established because the psychological report was conducted in the jail rather than at an inpatient facility, and no hearing was held after the psychologist found Lewis competent to stand trial; and (4) Lewis was denied effective assistance of postconviction and appellate counsel based on counsel's failure to adequately present these issues. The circuit court denied the motion without an evidentiary hearing, concluding it was procedurally barred by the rule against successive postconviction proceedings set forth in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

¶6 Whether a defendant is entitled to an evidentiary hearing on a postconviction motion depends on whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). When a postconviction motion is brought after prior direct appeal or postconviction motion, the court must first consider whether the new motion is properly brought or is barred under *Escalona-Naranjo*. The motion is barred unless the moving party provides “sufficient reason” for his or her failure to have raised the issues in the previous postconviction proceeding. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. An issue that was previously raised cannot be relitigated no matter how artfully it is rephrased. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Whether a postconviction motion is procedurally barred is a question of law that we decide de novo. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 Lewis’s most recent postconviction motion is procedurally barred because the issues regarding the removal of jurors or cause was previously raised, and Lewis has not established sufficient reason for his failure to have raised the remaining issues in his earlier postconviction proceedings. Lewis asserts his initial appellate counsel was ineffective for failing to raise the present issues on appeal. Even assuming without deciding counsel was ineffective, the argument ignores Lewis’s subsequent pro se filings.

¶8 As to his prior pro se filings, Lewis contends his competency was at issue, justifying his failure to adequately present his current issues in his first WIS. STAT. § 974.06 motion and in his petition for a writ of habeas corpus. However, as the circuit court noted, Lewis presented no evaluation by a mental health professional indicating that he lacked the intellectual capability to bring an

appropriate motion. The only medical evaluation of Lewis's competency resulted in a finding that he was competent to stand trial. Further, Lewis completed high school, with no special education classes, and attended college. He is also fluent in English. Nothing in the record suggests Lewis lacked the minimal competency needed for effective self-representation. See *State v. Klessig*, 211 Wis. 2d 194, 212, 564 N.W.2d 716 (1997). We reject Lewis's assertion that his poor presentation of the issues in his first § 974.06 motion in and of itself establishes sufficient reason for considering a second such motion. If poor presentation of an issue by a pro se defendant constituted sufficient reason for allowing additional postconviction proceedings, the exception would swallow the rule set forth in *Escalona-Naranjo*.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

